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IN THE

Supreme Court of the United States

October Term, 1956

No. 500

In the Matter of

The Petition of DIESEL TANKER A. C. DODGE, INC., owner of the Motor Vessel A. C. DODGE and SPENTONBUSH FUEL TRANSPORT SERVICE, INC., for exoneration from or limitation of liability,
Respondents (Appellees Below),

J. M. CARRAS, INC.,
Petitioner (Appellant Below).

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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The Petition of DIESEL TANKER A. C. DODGE, INC., owner of the Motor Vessel A. C. DODGE, and SPENTONBUSH FUEL TRANSPORT SERVICE, INC., for exoneration from or limitation of liability,

Respondents (Appellees Below),

J. M. CARRAS, INC.,
Petitoner (Appellant Below).

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

J. M. Carras, Inc., prays that a writ of certiorari issue to review only so much of the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on June 7, 1956, and adhered to by order entered July 13, 1956, denying timely petition for rehearing, as affirmed the granting by the United States District Court, Eastern District of New York, of the right of the A. C. Dodge interests to limit their liability.

Citations to Opinions Below

The Opinion of the United States District Court for the Eastern District of New York, printed in Appendix A hereto, *infra*, p. 9, is reported in 133 F. Supp. 510 and 1955 A. M. C. 1739. The unreported interlocutory decree of the District Court is printed in Appendix A hereto, *infra*, p. 34. A Supplement to the District Court's Opinion, dated July 6, 1955, substantially denying a motion by the A. C. Dodge interests for reargument is printed in Appendix A hereto, *infra*, p. 37, and is not reported. The Opinion of the Court of Appeals, printed in Appendix A hereto, *infra*, p. 38, is reported in 234 F. (2d) 374 and 1956 A. M. C. 1513. The unreported judgment of the Court of Appeals is printed in Appendix A hereto, *infra*, p. 45. The opinion and order of the Court of Appeals denying petitions for rehearing (the Petition for Rehearing filed by Petitioner herein is printed in Appendix B hereto, *infra*, p. 49) are printed in Appendix A hereto, *infra*, pp. 46, 48.

Jurisdiction

The Opinion of the United States Court of Appeals for the Second Circuit was handed down June 7, 1956, and judgment was entered on the same day (Appendix A, *infra*, p. 38). Timely petition to the Court of Appeals for rehearing, filed on June 22, 1956 (Appendix B hereto, *infra*, p. 49), was denied by an order filed July 13, 1956 (Appendix A hereto, *infra*, p. 48). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

Question Presented

Whether limitation of liability for damages caused by a collision should be denied where a vessel owner is privy to violations of the United States manning statutes and there is no evidence to show lack of causal connection between such violations and navigational fault of the vessel found to have contributed to the collision.

Statutes Involved

The case involves the Limitation of Liability Statute, Rev. Stat. Sec. 4283, as amended, 46 U. S. C. § 183; the statute requiring a licensed pilot to be on the bridge of a vessel while it is in pilotage waters, Rev. Stat. Sec. 4401, as amended, 46 U. S. C. § 364; and the following statutes, enacted to promote safety at sea, regarding the manning of vessels: Rev. Stat. Sec. 4463, as amended, 46 U. S. C. § 222; 40 Stat. 549, as amended, 46 U. S. C. § 223; 40 Stat. 549, as amended, 46 U. S. C. § 235; and 38 Stat. 1164, as amended, 46 U. S. C. § 673.

The texts of the foregoing statutes are printed in Appendix C, *infra*, p. 53.

Statement of the Case

The Motor Vessel A. C. Dodge, owned by Diesel Tanker A. C. Dodge, Inc., a respondent herein, collided with the s/s Michael, owned by J. M. Carras, Inc., petitioner herein, on May 25, 1952, near a bend below Reedy Island in the narrow channel of the Delaware River. Extensive damage to the Michael resulted; the Dodge sank; and there were numerous deaths and personal injuries.

Suits were commenced against the Dodge interests in the New York State courts, and, in an effort to limit their liability for damages resulting from the collision, Diesel Tanker A. C. Dodge, Inc., and Spentonbush Fuel Transport Service, Inc., filed a petition on November 24, 1952 in the United States District Court for the Eastern District of New York, pursuant to the provisions of the United States Limitation of Liabilty Statute. The District Court had jurisdiction of this admiralty case under 63 Stat. 101, 28 U. S. C. 1333(1) and the Limitation Statute. On January 9, 1953, J. M. Carras, Inc., filed its answer and claim in

the limitation proceeding for the damage suffered by the Michael, detention damages, and amounts paid in settlement of death and personal-injury claims.

After a trial on the merits, the Trial Court held both ships in contributory fault for the collision. The Dodge was condemned for her master's failure to sound a timely danger signal, the Court holding that this fault contributed to the disaster.

The Trial Court, however, granted the Dodge interests the right to limit their liability. The evidence showed that the Dodge did not have sufficient navigating officers and licensed pilots on board, and the Court reached the conclusion that the Dodge was in violation of the manning statutes enacted by Congress to promote the safety of life at sea. Nevertheless, on the basis of *absence* of evidence as to whether or not there was a causal relation between the undermanning and the Dodge's negligent failure to sound a danger signal, the Court, stating that "nothing however can be assumed concerning [the Dodge's navigator's] physical condition with respect to fatigue or otherwise," concluded that such causal relation did not exist. In order to leave the way "open to correction without the necessity for a new trial," in case the Trial Judge were reversed on the question of causal relation, there was a finding that the undermanning of the Dodge was "with the privity of her owner" (Appendix A hereto, at pages 30, 32).

On December 7, 1955 the Interlocutory Decree of the District Court, holding both vessels to blame and granting the right to limit liability was entered. On December 20, 1955, Diesel Tanker A. C. Dodge, Inc., and Spentonbush Fuel Transport Service, Inc., filed notice of appeal to the United States Court of Appeals, Second Circuit, from so much of this decree as held them in fault on the merits. On December 22, 1955, J. M. Carras, Inc., filed notice of appeal from so much of the decree as held petitioners

entitled to limit their liability. The Court of Appeals had jurisdiction under 28 U. S. C. § 1291, § 1292(3).

The Court of Appeals affirmed the Trial Court, both in its finding of mutual fault and in its granting of limitation of liability, and upon full briefs denied motions for rehearing filed by both vessels.

Regarding the right to limit, the Court of Appeals accepted without discussion the Trial Court's statement that there was no causal relation between the Dodge's undermanning and the Dodge's negligent navigation. Since the undisputed absence of evidence regarding causal relation was stressed before the Court of Appeals, that Court's holding is an affirmance of the Trial Court's decision to place on *claimants* the burden of demonstrating that there was a causal relation between the violation by the owners of the Dodge of the manning statutes and the Dodge's negligent navigation which was held to have contributed to the collision.

Reasons Why Certiorari Should Be Granted

The holding of the Court below, that the burden is on claimants in a limitation proceeding to prove causal relation between a collision and statutory faults of the vessel owner seeking limitation, is in direct conflict with its own earlier rule and with the decisions of the United States Courts of Appeals for the Fourth and Ninth Circuits interpreting the long-established rule of this Court in *The Pennsylvania,* 19 Wall. (86 U. S.) 125, that a vessel guilty of a statutory fault has the burden of proving that such statutory violation could not have contributed to the collision.

In *The New York Marine No. 10,* 109 F. (2d) 564, 566 (1940), the Court below stated that, when there is a violation of the manning statutes by a vessel owner seeking limitation of liability,

> "* * * it is presumed that the fault is a contributory cause and the petitioner must bear the burden of showing that it was not—The Pennsylvania, 19 Wall. 125 * * *."

Limitation of liability was denied.

In *Martin Marine Transportation Co.* v. *United States,* 183 F. (2d) 676, 680 (1950), the Court of Appeals for the Fourth Circuit, in denying limitation on the basis of violations of the manning statutes, stated, relying on *The Pennsylvania*:

> "Upon such a violation of the statutory regulations, the burden is placed upon the [vessel owner seeking limitation of liability] to show that this *violation could not have contributed to the collision.* * * *" (Emphasis by the Court.)

Limitation of liability was denied.

In *The Denali,* 105 F. (2d) 413, 419 (1939) cert. den. 311 U. S. 687, the Court of Appeals for the Ninth Circuit stated that violation of a manning statute designed to prevent fatigue in navigators places on the owner seeking limitation of liability the burden to show that such statutory violation

> "* * * *could not* have contributed to the miscalculation in the hour of anxiety and strain which brought the vessel's destruction." (Emphasis by the Court.)

Limitation of liability was denied.

On rehearing, in adhering to its original decision, 112 F. (2d) 952, 957, the Court of Appeals for the Ninth Circuit further stated:

> "* * * there seem to us compelling reasons why the violation of a statute to prevent loss of life and property by attempting to secure absence of fatigue from the vessel's navigators shall have the Pennsylvania rule apply in suits against the ower which consciously has violated it."

It is submitted that the present holding of the Court below is erroneous and the rule followed by the Fourth and Ninth Circuits and until now by the Second Circuit, is correct. The present holding by the Court below is in violation of the policy of Congress and of this Court. As stated by the United States Court of Appeals for the Ninth Circuit regarding shipowners found privy to violations of the manning statutes (105 F. (2d) at 420):

> "It is not conceivable that the Congress intended to give to such wrongdoing shipowners the extraordinary relief of the limitation act, with a less burden of proof relative to the effect of their wrongdoing, than for other violations of statutes for the safety of life and property at sea."

And on rehearing (112 F. (2d) at 958):

> "In the language of *The Pennsylvania*, in violations of legislation to prevent fatigue in navigators, if anywhere, 'Such a rule is necessary to enforce obedience to the mandate of the statute'."

CONCLUSION

It is respectfully submitted that the foregoing considerations warrant allowance of the writ sought by petitioner.

Dated: New York, N. Y., October 10, 1956.

Respectfully submitted,

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APPENDIX A

Opinions Below

Opinion of Trial Court

(Also printed at page 12 of the certified record submitted herewith, hereinafter referred to as "R.")

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

No. A. 19971

IN THE MATTER

of

The Petition of DIESEL TANKER A. C. DODGE, INC., owner of the Motor Vessel *A. C. Dodge*, and SPENTONBUSH FUEL TRANSPORT SERVICE, INC., for exoneration from or limitation of liability.

July 6, 1955.

Messrs. FOLEY & MARTIN, Proctors for Petitioners, by CHRISTOPHER E. HECKMAN, Esq., and JOHN H. HANRAHAN, JR., Esq., Advocates.

Messrs. HAIGHT, GARDNER, POOR & HAVENS, Proctors for SS. *Michael*, by MAC DONALD DEMING, Esq., JAMES M. ESTABROOK, Esq., and GORDON W. PAULSEN, Esq., Advocates.

Messrs. BRENNER, HANNAN & MURPHY, Proctors for various death and personal injury claimants, by LAWRENCE H. REILLY, JR., Esq., and TIMOTHY V. SMITH, Esq., Advocates.

BERNARD ROLNICK, Esq., Proctor for PALTER and KOSINSKY damage claims.

Messrs. GREENHILL & GREENHILL and FREEDMAN, LANDY & LORRY, Proctors for various death and personal injury claimants, by WILLIAM ALPER, Esq., Advocate.

THOMAS M. BREEN, Esq., Proctor for various death and personal injury claimants.

BYERS, *D. J.*:

This is a limitation proceeding resulting from the sinking of the laden tanker *Dodge* by the laden tanker *Michael* on June 25, 1952 at about 10:30 p. m. D. S. T. in the upper Delaware River, some miles northerly of its entrance into Delaware Bay. The *Michael* struck the *Dodge* about 25 feet forward of her stern on the port side, at an estimated angle of 45 degrees.

The collision caused an explosion upon the *Dodge* at once, and in the ensuing fire on that ship all hands save one perished, and the ship went down by the stern to the bottom within a few minutes—estimated at three. The fire did not burn itself out for several hours, presumably because the forward floating part of the hulk remained in a vertical position until the contents of the tanks had been consumed.

Eight men lost their lives which means that no testimony on the part of the *Dodge* is available concerning her navigation prior to the collision, since the survivor, Tellefsen, was in the watch below from 6:00 p. m. D. S. T. onward and was rescued from the water into which he was hurled or jumped, after an interval of some hours.

The colliding tanker *Michael* also took fire at once and having pulled away from the *Dodge* after penetrating her hull some 14½ feet on the port side near the stern, her crew under the leadership of the mate, was organized into

a fire fighting effort which successfully functioned so that this ship was ultimately beached and later reached a shipyard for repairs. Two lives were lost on the *Michael*, including that of Gustafsen, the third mate.

This tragic happening was in the making for only about four minutes as nearly as can be computed and, in light of all the testimony, was inexcusable.

Since strong reliance is placed by the claimant Carras (owner of the *Michael*) upon the testimony of the captain and pilot of that ship, a word should be said at the outset, of the conditions on board during the first few minutes after the collision.

Those in the wheelhouse at the time were the captain, Amy, the pilot, Lemmon, the third mate, Gustafsen, and the helmsman Sibley; the first three at once left the pilothouse as the result of the crash, while Sibley remained for a brief time at the wheel.

Fire at once burst out on the *Dodge*, and the *Michael* backed out from engagement with her, the engines at that time being in reverse, and the explosion, which at once occurred on the *Dodge*, started a fire on the *Michael*. In the confusion of the moment, there was a delay in sounding the general alarm on the latter but that was done after an estimated interval of three or four minutes.

It is said that ultimately Captain Amy went to the bridge, and two witnesses deposed that the pilot climbed in a lifeboat which was not launched. He denies that he did this, and this recital is not intended to be a finding as to that specific subject.

It is not a cause for wonder that the catastrophe unnerved those who, almost without warning, were required to deal with its effects, but these few moments that bordered upon panic cannot be ignored in appraising the testimony now adduced after a lapse of nearly three years, in which the captain and the pilot have had ample opportunity to reflect and rationalize.

Since the case for the *Michael* is based upon the central theory that the *Dodge* was at fault in the matter of her navigation, it will be convenient to discuss that aspect of the controversy at the outset, because its demonstration or lack thereof is of immediate consequence concerning the right to limitation.

The Parties to the Litigation.

Petitioners:

The corporate owner of the *Dodge,* Diesel Tanker A. C. Dodge, Inc. (to be called A. C. Dodge), and the corporate operator thereof (Spentonbush).

Claimants:

The owner of the *Michael,* J. M. Carras, Inc., to be called Carras;

Mrs. Frances E. Elliott, widow of the deceased master of the *Dodge;*

Palter and Kosinsky retained their status as claimants but offered no testimony at the trial;

The claimants August Guerin and the Estate of Guerin, Tellefsen, Dafnos and Allard withdrew their claims before the testimony was closed.

The *Dodge* was a total loss and the owner has abandoned the wreck; it was stated that there was no pending freight because delivery of cargo had to be made in order to earn it.

In effect therefore there is no limitation fund in court, which means that the sole possible redress against the *Dodge* interests may perhaps be that of personal injury claimants (see *Tit. 46 U. S. C. §183, subd. (b), et seq.*).

The Vessels.

Diesel Tanker *A. C. Dodge,* 250′ 6″ by 37′ 1″; depth 14′ 4″; tank capacity 15,800 barrels; h. p. 805; gross tonnage 1,147; net 951.

Tanker *Michael,* 523′ 6″ by 68′ 1″; depth 39′ 1″ tank capacity 140,722 barrels; h. p. 6,000; gross tonnage 10,441; net 6,249.

The waters involved were part of the Delaware River as shown on U. S. Coast & Geodetic Survey Chart No. 294, namely, that reach between the entrance to the Chesapeake & Delaware Canal on the westerly side of the river, on the north, and Liston Point on the south; this means that a portion of the Liston Range, all of the Baker Range, and all of the Reedy Island Range constituted the waters involved.

The channel in those ranges was 800 feet wide except at the southerly end of Reedy Island Range where it merges into Baker Range; here the width is said to have been about 1200 feet in the vicinity of Quick Flashing Light and Bell Buoy "2R", and the navigation of both vessels was confined to the channel according to the credible evidence.

The tide was flood, of a strength of 1½ knots, and there was a light southeast wind; visibility was good, although earlier in the evening there had been showers, and seemingly there was no moonlight to illuminate these waters.

The *Michael* was proceeding up the river with the tide, and the *Dodge* in the opposite direction, and range and running lights were showing.

The mutual approach of these vessels was oblique, as will be seen from the chart.

The Compass Courses.

The true compass course from south to north in the various ranges are as follows:

Liston Range	317°
Baker Range	355°
Reedy Island Range	15°

which means that the northbound vessel would make about a twenty degree right turn moving from Baker Range into Reedy Island Range.

The lengths of the ranges are stated, without contradiction, to have been:

	N. M.
Liston Range	12.4
Baker Range	1.65
Reedy Island Range	4.26.

The total of the last two is 5.91.

The vessels' respective speeds over the ground were about:

Michael	15 knots.
Dodge	9 knots.

This means the combined speeds were 24 knots or about 800 yards per minute. Since the distance from the northerly end of Reedy Island Range to the southerly end of Baker was roughly 6 nautical miles, a place of meeting would be reached in near enough to four minutes to indicate the approximate time in which these vessels could have arranged for safe passage port to port in an 800 foot channel.

The foregoing is not contested, and requires no findings.

The *Michael's* Theory Concerning the Navigation of the Dodge.

It is urged for the colliding vessel that the navigation of the *Dodge* was faulty in that she veered from her own starboard side of the channel across nearly to the easterly edge, with the probable intention of proceeding on that side of the Reedy Island Range east of buoy 2-R on a shortcut which would save about ten minutes in time and bring her into the Liston Range in the vicinity of buoy 8-L; that course would have opened to the *Michael* the starboard

running light of the *Dodge*, and thus a probable starboard passing with the *Michael*.

In conformity with this theory Lemmon testified that the *Dodge* sank at a place just north of buoy 2-R and to the east of the easterly channel line of the Reedy Island Range.

That testimony is not accepted in the belief that "that wish is father to the thought" for the following reasons:

As has been stated, the immediate effect of the collision and the explosion with accompanying flames and smoke on the *Dodge* was to create such consternation in the wheelhouse of the *Michael* as to render it extremely unlikely that any accurate observations were made as to the place where the *Dodge* sank at the stern within a very few minutes, estimated at three or four, since the fire, first on the *Dodge* and immediately upon the *Michael*, was so devastating that mental reactions as related at the end of nearly three years, cannot now be relied upon; it is no reflection on Lemmon to say that he was more concerned with his own safety than with trying to spot the place of the collision. Captain Amy does not attempt to do so, and his testimony may be quoted:

> "Q. Where did the collision occur? A. It was in the vicinity of 2-R. I didn't watch the buoy too closely as I was watching the vessel rather than the buoy.
>
> "Q. When you say in the vicinity of 2-R, what do you mean by that? Within a half mile of it? A. It could have been above or it could have been below a quarter of a mile either way."

It is to be remembered that 2-R is a flashing red buoy.

It is a reasonable inference from the testimony of the pilot Marshall of the down bound *Socony* (later to be mentioned) that her overtaking and passing of the *Dodge*, which was accomplished just above the northerly end of Reedy Island Range placed the downbound *Dodge* in her own star-

board side of the channel; the respective speeds of these vessels were 10.8 of the *Socony,* and about 9 of the *Dodge.*

Pilot Marshall also of the *Socony* testified as to these speeds:

> "A. I was about two knots faster than she was. It took me 15 minutes to get by her, so about two knots. Her speed would be nine."

The foregoing is thought to mean that while the *Dodge* was at the northerly end of Reedy Island Range she was on the proper side of the channel, and incidentally it may be that the presence of the *Socony* while so passing in those waters, is what caused Lemmon to say at the trial that when the *Michael* was on the Liston Range he saw a (downbound) vessel and he wasn't sure that it was the *Dodge;* thus:

> "There were two vessels—if you want to go into that, sir—
>
> "The Court: Was there any vessel between the *Michael* and the *Dodge?*
>
> "The Witness: There was, yes, sir. That is the reason I say, when I mark that the *Dodge,* I did not know at the time that it was the *Dodge.* I just saw the range lights and side lights of a vessel."

On the assumption that the testimony of Marshall puts the *Dodge* in her own side of the channel within four minutes prior to the collision, no reason has been shown why she should have very quickly altered her course so as to head for the easterly edge; this must be so because the first signal blown by the *Michael* to the *Dodge* was one-blast for a port passing; this means that at the time of that signal there was no eastward heading observable on the part of the *Dodge.*

According to Lemmon, a minute to a minute and a half elapsed before the *Michael* blew a two-blast signal for a starboard passing, and during that interval she advanced

from 500 to 750 yards, and the *Dodge* from 300 to 450 yards.

It is important to realize the significance of that one-blast signal from the *Michael* and her failure to make any other signal for a minute and a half; it points to a then understanding on the part of the navigator of the *Michael* that the *Dodge* was not only in her own waters, but any turning therefrom was not to be anticipated; nor was Pilot Lemmon (whose familiarity with the river and the practices of the vessels navigating upon it must be presumed), who announced any change in the heading of the *Dodge*. It was the Captain, Amy, who was a stranger to the Delaware River; he cried out that the *Dodge* was going left, and in obedience to that ejaculation the *Michael* executed a left rudder and blew two blasts, at Lemmon's order. In other words, the *Michael* was navigated in response to the captain's erroneous judgment as to the apparent course of the *Dodge*.

The foregoing is based upon the versions of both Amy and Lemmon, and also upon the clear and convincing narrative of the helmsman, Sibley.

As Lemmon's testimony was given on the witness stand, it appeared to me that he was entirely uncertain and unconvincing on the subject of whether he ever anticipated that the *Dodge* would take the short cut used by light draft vessels, since obviously he could not even estimate her draft by observing her lights.

The unsoundness of Lemmon's theory as to the possible intention of the *Dodge*—even if he indeed attributed it to her, which I doubt—is exposed by an examination of the chart which clearly indicates that the cut-off route would have been initiated at buoy 4-B and not above 2-R, because the waters just east of the latter are shallow, the indicated depth being 13 feet which was the draft of the *Dodge;* even on a flood tide it is not to be supposed that she would have risked following the course that Lemmon now says she could have intended.

Lemmon admitted that if he had known that the *Dodge* had in fact answered his first on-blast signal with one blast of her own whistle, he would not have navigated as he did. This means I think that he would not have ordered the left rudder and blown the two-blast signal; or stated otherwise, he would not have attributed to the *Dodge* a swing to the east side of the channel.

It is assumed that Amy and Lemmon in the order named, did observe the green light of the *Dodge* for a brief interval, for the vessels were within a point or two of being in line; this means that there could have been a brief easing of the *Dodge's* helm which was promptly corrected; also the course of the *Michael* in preparing to round into Reedy Island Range could have been responsible for a shifting in her own post of observation. This is another way of saying that the differences in what was seen by Amy and Lemmon on the one hand and Sibley and Fields on the other, could be accounted for by differences in time and in the position of the *Michael* in the short interval that elapsed between the signals blown by the *Michael*, during which the several observations were made.

It is urged for the petitioners that Lemmon must be wrong as to the place of the collision, because the sunken position of the *Dodge* was at the westerly edge of the channel. That is a circumstance which has its place, but standing alone would not suffice to disprove testimony, because the angle of the collision would impel the disabled *Dodge* in that direction. The blow was inflicted by a ship of 10,441 gross tonnage that was moving at the rate of 10 knots, and the momentum of the impact must have been of great magnitude.

For the reasons stated, it has become apparent to this court that the testimony of Lemmon and Amy is unconvincing to the effect that the *Dodge* departed from her expectable course after the one-blast signal blown by the *Michael;* consequently that the navigation of the *Dodge* is not shown to have been at fault.

FINDING #1: The *Dodge* did not navigate in the easterly side of the channel while proceeding down river in the Reedy Island Range of the Delaware River, on June 25, 1952; nor is her navigation shown to have been at fault prior to the time that she was struck by the *Michael*.

SIGNALS

That the *Michael*, being on Baker Range and somewhere between buoys 4-B and 2-R, blew one blast to the *Dodge* for a port passing, is attested by so many witnesses as to require acceptance without discussion.

Whether the *Dodge* answered with one is in dispute: Amy and Lemmon say that they heard no acceptance. They were in the pilothouse which was enclosed, as will be observed by examining Claimant's Exhibits C, D, and E, but whether the doors at either side and the ports were open during the critical times is not clearly shown by the testimony.

In addition to Lemmon and Amy, the following witnesses testified concerning the whistle signals of both vessels:

Baker, a local resident,
Idzahl, master of the *Socony*, and
Marshall, pilot of the *Socony*, for the claimant,
Sibley, helmsman on the *Michael*,
Fields, lookout on the *Michael*, and
Kilbride, second mate on the *Michael*, for the petitioner.

Baker says that he heard one whistle and then two whistles and then one whistle, and that the third signal was a long whistle that wouldn't quit and that the explosion seemed to come while that was blowing.

Idzahl (*Socony*) said that being about a mile below the *Michael* after having passed that vessel to port, there

was a one whistle blast, then shortly a two whistle blast, and then there was another short one "but the two first ones came from the T-2 tanker and I am familiar with the T-2 tanker when I hear one, but the third one was a different sound again." This testimony does not indicate a one-blast signal given by the *Michael* following two blasts, which both her pilot and captain describe; therefore in this respect is not complete as to the signals blown by the *Michael*.

Marshall says that after passing the *Michael* and when she was just astern of the *Socony*, the *Michael* "sounded one blast of the whistle. * * * after one blast by the *Michael* I cannot say how long elapsed, but it was a good interval, and the *Michael* sounded two blasts. Immediately following the two blasts I heard one short toot from an airhorn the type of the *A. C. Dodge* who I had just blown into, and heard her answer. It could only be the *Dodge*. There were only three of us in the vicinity. Immediately following that, there was one long blast from a whistle the type of the *Michael*." A comment made by the witness to the third mate was stricken.

The sequence of signals as so related is not in accordance with the testimony of either Lemmon, Amy or Baker, and is significant in that it attributes a one-blast signal to the *Dodge* after the two blasts from the *Michael*.

Sibley was the helmsman from about 9:40 P. M. and his testimony is clear that at a time when these vessels were approaching from opposite directions, the *Michael* sounded the first signal, namely a one blast; that the next signal was a one blast from the *Dodge*, and thereafter the *Michael* sounded two blasts, which were shortly followed by one blast from the *Michael*, after which he heard no other signals.

Fields was the lookout stationed on the bow of the *Michael* (five years experience at sea, four of which were in the Navy). He first sighted the *Dodge* "coming around

the bend, on the starboard side * * * about a point or a point and a half on the starboard side of the channel." He was posted as lookout about 10:20 p. m. and two or three minutes later he observed the *Dodge,* namely her range and red running lights. He was just going to walk back and report the vessel when the *Michael* blew a one-whistle signal and he heard an answering one whistle from the *Dodge;* " * * * after that the *Michael* sounded a two-blast signal and then she sounded a one-blast signal." He said that the *Dodge* was showing a red light at the time of the interchange of one-blast signals and that when the *Michael* sounded her two blasts the *Dodge* was still showing her red light and as nearly as he could remember the same was true when the *Michael* blew the one-whistle signal following the two.

Kilbride, the second mate, was below, and heard the *Michael* blow one whistle and another vessel answer it and a little later the *Michael* blew two whistles and "the other vessel did not answer. A little while after, the *Michael* blew one whistle and just a little while afterwards the crash."

The testimony of these three witnesses has been weighed in the light of a possible bias on the part of Sibley and Kilbride based upon interchanges between them and Captain Amy during the course of this voyage of the *Michael* from the Persian Gulf.

So far as Kilbride is concerned, his testimony is not deemed to be controlling since both portholes in his cabin were closed at the time that he heard these signals, but for what it is worth I am satisfied from observing him on the witness stand, that such differences as occurred between him and Captain Amy did not cause him to testify falsely in court.

As to Sibley, his deposition as a whole creates the impression that he was an intelligent and quite articulate witness; he owned to differences and interchanges with the captain due to the fact that he was the union repre-

sentative on the ship; however the narrative in his deposition was substantially the same as that that he gave at the Coast Guard hearing a few days after the collision; since he and the lookout, against whom no prejudice seems to be urged, agree to the fact that the *Dodge* gave an answering signal accepting the original one blast for a port passing blown by the *Michael*, the testimony to that effect is accepted by this court.

Not so many years ago it was customary in the admiralty to make allowances for an understandable and somewhat reassuming bias on the part of seamen in favor of their own ship. It is possible that marine union activities have led to a departure from that attitude of an earlier day, but with what impact upon the ultimate cause of truth and veracity may not be entirely certain. The margin of persuasion lies with the *Dodge* as to the acceptance of the one-whistle signal blown by the *Michael*, and findings concerning the whistle signals of both vessels follow.

FINDING #2: While the *Michael* was on Baker Range and between buoys 4-B and 2-R, she blew a one-whistle signal to the *Dodge* for a port passing.

FINDING #3: The *Dodge* answered that with a one blast acceptance while the vessels were yet far enough apart to safely effect such passing.

FINDING #4: After an interval of about one and one-half minutes, the *Michael* blew a two-blast signal (without having reduced her speed), for a starboard passing.

FINDING #5: The *Dodge* did not answer that signal, nor did she blow a danger signal.

FINDING #6: Within about one minute or slightly less, the *Michael* blew a one-blast signal for a port passing, and in less than a minute the *Michael* ran down the *Dodge* and sank her.

FINDING #7: The *Michael* did not blow a danger signal at any time.

FINDING #8: The *Michael* at almost the instant of striking the *Dodge*, put her engines in reverse, but did not blow a three-whistle signal so to indicate.

HELM MOVEMENTS OF THE *Michael*

These must be understood in light of the indicated compass courses on the succesive ranges heretofore listed. If the first sight of the *Dodge* on the part of the *Michael* prior to the latter's one-blast signal, actually occurred, as seems to have been the fact, while the *Michael* was yet on the Liston Range, the *Dodge* would have appeared as much as three to four points on the starboard bow of the *Michael;* then as the latter turned from a true compass heading of 317 on the Liston Range, to 345 instead of 355 on the Baker Range, the *Dodge* would seem to be more nearly ahead, namely from a point to a point and a half on the *Michael's* starboard bow. As the latter proceeded up the 1.65 nautical miles of the Baker Range and was about to enter Reedy Island Range, her true compass course would change to 15—a matter of 20 degrees, and it would be important to know exactly how that change was made:

Lemmon says that leaving the Liston Range and entering Baker, the course was 345 to accommodate a possible southbound vessel using the cut-off above referred to, although there was no such vessel in sight at that time; this means that the *Michael* swung somewhat wide in entering the Baker Range, but whether wide enough to see the starboard light of the *Dodge* does not appear, although as the *Michael* continued (passing the *Socony*) the course was changed to 359 at slightly above buoy 4-B, which is about 1600 yards southerly from buoy 2-R, and that was the position of the *Michael* when she blew her one-blast signal to the *Dodge* which Lemmon estimated to be distant about one and one-half miles.

The next change of helm was for a ten-degree right rudder to round buoy 2-R; Sibley reported his helm at 009 and was told to continue swinging and steady at 015, being the Reedy Island compass course, and it was at that time that Lemmon said that the *Dodge* abruptly turned closing out her red sidelight and showing the green light, which he then placed at a point or a point and a half on the *Michael's* starboard bow.

It will be seen that the accuracy of that observation would depend on whether the *Michael* was swinging wide around 2-R or not, because if when she was proceeding up Baker Range her heading was not 355 according to the compass course, but 345 at the outset and later changed to 355, she *could* have been sufficiently to the west to see the starboard light of the *Dodge* even though the latter had made no change in her own heading. This however is so much a matter of conjecture that no finding can be based upon it.

Whatever the precise position of the *Dodge* was thought to be when Captain Amy reported that she was going left, the fact is that Lemmon ordered to helmsman to give a full left wheel and blew two blasts to the *Dodge*. This was done after an interval from the first blast which Lemmon estimates to have been from a minute to a minute and a half.

There was no answer from the *Dodge* to the two-blast signal, and Lemmon says that at the time he was below buoy 2-R, not quite up to it.

It is impossible to understand why at this juncture neither vessel blew a danger signal, but such is the fact, and the fault was mutual and glaring. Since this decision proceeds upon the theory that the *Dodge* had accepted the original one-blast signal from the *Michael*, it was her duty to stop and sound the danger signal immediately after the two-blast signal from the *Michael*, and that her failure to do so must be deemed to have contributed to the catastrophe, admits of no doubt.

The *Michael's* hard left rudder above referred to was ordered while the ten degree right rudder swing was still effective, which means that the *Michael* did not at once swing to her left, but during that movement Lemmon said "the *Dodge* again opened up his mast headlight and range light, closed out his green light, and showed me his broad red * * * about one point on my starboard bow * * * I immediately gave the order to right full rudder, sounded one blast of the whistle, and Captain Amy almost immediately at the same time rang the engine full speed astern by the telegraph."

Incidentally, no bridge bell book has been produced.

Lemmon estimates the interval between the two-blast and the second one-blast blown by the *Michael* has about one minute. Lemmon says that the ships were then about a thousand feet apart; since the engine movement full speed astern did not take effect at once, the *Michael* was making about ten knots through the water when she struck the *Dodge*, so that the collision occurred within much less than one minute from the second one-blast signal, because the vessels were approaching at a combined speed of over 600 yards a minute.

The interval between the *Michael's* two-blast signal and her second one-blast is estimated by Lemmon, as above stated, as about one minute. During which she moved in response to the left, then hard left rudder, but how far no one undertakes to say. Since the channel was about 1200 feet wide at buoy 2-R and the *Michael* was about 500 feet long, she would have to proceed less than three lengths to be well into the *Dodge's* side of the channel before the helm was again changed to hard right. Sibley says that the ship was still moving left at the time of impact, which would explain the 45 degree angle of collision.

Thus it will be seen that the helm movements of the *Michael* were calculated to cause her to strike the *Dodge* in the latter's own side of the channel which is where the collision occurred as nearly as can be made out from the

testimony, rather than at the place indicated on the chart by Lemmon; and it is so found.

> FINDING #9: The *Michael* struck the *Dodge* while the latter was in the westerly half of the channel at about where Reedy Island Range converges with Baker Range, or slightly to the north.

NAVIGATION OF THE *Michael*.

The outstanding aspect of the navigation of the *Michael* is that at no time while this collision was in the making did she arrest her speed, which was from 15 to 15½ knots over the ground, until the order to reverse engines was given above referred to; this means that while she professes to have been in doubt as to the course of the *Dodge* at the end of a minute and a half after her one-blast signal—which leaves 2½ minutes yet to elapse—she did not slacken her speed, which was the plain requirement as the evidence is presently understood.

From the time that she blew her two-blast signal, knowledge is necessarily attributed to her that a condition of peril was in the making if it had not already arisen, and the plainest requirement of caution was to reduce her speed at least to mere steerageway, and no testimony offered for her can be deemed to exculpate her for that fault.

Assuming that the hard left helm and the two-blast signal were about simultaneous, there was a remaining interval in which she was required to blow an alarm, namely,

> "Rule III. If, when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam whistle." (33 U. S. C. § 203.)

That the *Michael* failed to understand the course and heading of the *Dodge* is clear from the testimony of both

Lemmon and Amy, and why the doubt was not signified on the whistle is one of the mysteries of the cause.

Not only should the *Michael* have blown a danger signal but she should have promptly cut down her speed to steerageway, and the failure to do so between her two-blast signal and her final one-blast must be deemed to have played a major part in the collision.

The *Michael's* ex-parte exposition concerning the navigation of the *Dodge* is held to have failed to persuade. The navigation of the *Dodge* has not been discredited and her own failure to blow the danger signal had nothing to do with her position in her own side of the channel.

> FINDING #10: The *Michael* was grievously at fault: (a) For not reducing her speed at the time of blowing her two-blast signal and stopping if need be, to avoid the peril of collision; (b) For not blowing a danger signal and stopping her engines when she received no answer from her two-blast signal to the *Dodge*; (c) For not blowing a three-blast signal when she reversed her engines just prior to running down the *Dodge*. This was a fault, although probably played no part in the collision.

THE MANNING OF THE *Dodge*.

The claimants seek to defeat limitation by arguing that the *Dodge* was undermanned, with the result that those in charge of her navigation must have been suffering from fatigue. This argument might have weight if the evidence demonstrated faulty navigation on the part of the *Dodge*, but as has been seen such is not the effect of the testimony. Therefore the argument reduced to lowest terms means that the undermanning, if it existed, automatically deprived the *Dodge* of the right to limit, in spite of the fact that she was run down and sunk by the *Michael*, whose eccentric navigation is deemed by this court to have been the predominant cause of the disaster.

The *Dodge* was bound to Baltimore, Maryland, on a trip from Eagle Point, New Jersey, departure having been had at about 6:45 p.m., and the ship's company consisted of the following:

John D. Elliott, Captain;
John W. Elliott, Second Mate (son of the captain);
Charles Hoie, Chief Engineer;
John R. Holmes, First Assistant Engineer;
Ramond E. Anderson, Rasmus S. Kleppe, Howard E. Moller, Sjur Tellefsen, Deckhands;
William O'Brien, Cook.

The First Mate and others of the crew were not on board, presumably because they were taking their ten days ashore out of every thirty days' employment by the ship.

Petitioner's Exhibit 6 is the certificate issued by the Coast Guard, stating the requirements of the number of men to be carried, namely, one master, one chief mate, one second mate, one third mate, four able seamen, two ordinary seamen, one chief engineer, one first assistant engineer, one second assistant engineer, one third assistant engineer and one certificated lifeboat man. There is a typewritten rider attached to the certificate containing a modification, namely,

> "When navigating on Bays, Sounds and Rivers, one first class pilot is required in lieu of three mates and the second assistant and third assistant engineers may be dispensed with. When navigating on Bays, Sounds and Rivers, and if the hours of duty do not exceed 12 of any 24, the following licensed officers and crew are required: One master and pilot, two able seamen, one o. seaman, one chief engineer. When navigating on a Harbor or River route exclusively, deckhands may be carried in lieu of able seamen and the lifeboat man may be dispensed with."

The trip between the points named was a customary run for the *Dodge* at this time, and was usually accomplished via the Chesapeake & Delaware Canal, the river entrance to which will be found on the chart in evidence, whereby the vessel restricted herself to inland waters, namely, bays, sounds and rivers.

On this occasion, however, by reason of the presence of a wreck in the canal, it became necessary to complete the southbound voyage by proceeding down the Delaware River to its mouth, thence in the ocean to Newport News. Therefore it is argued that the quoted restriction from the certificate should not be held to apply to this voyage (although the collision occurred in the river before the voyage was completed), and the *Dodge* must be deemed to have been undermanned because part of the voyage would be coastwise.

That is the view which the Coast Guard took in a proceeding arising out of its investigation into the collision; the result was a fine levied upon the owner of the *Dodge* as for a violation of the controlling statute (Tit. 46 U. S. C. §§ 222, 223, also 235), namely the operation of the *Dodge* on a coastwise voyage without the required crew complement, the deficiency being one chief mate, one second assistant engineer and one ordinary seaman.

A prior fine had been levied in December, 1951 against the owner for a similar violation involved in a voyage which was also partly at sea, testimony concerning which was received, not because it tended to prove anything concerning the issues in this cause, but because it constituted specific notice to the owner of the *Dodge* that a similar deficiency (one chief mate, one assistant engineer, one able seaman and one ordinary seaman) was deemed to constitute a violation of the applicable statute.

The legal effect of the said 1952 holding by the Coast Guard is that there was an administrative finding of a violation of law and regulations promulgated in the public interest; of course that finding does not purport to touch

the question of the navigation of the *Dodge* on this occasion. The subject is referred to only that the record may be complete.

It is assumed but not decided, that the *Dodge* was undermanned for the purpose of a coastwise voyage which had been begun when she left Eagle Point to the knowledge of her owner and operator (Spentonbush).

Much of the discussion in the briefs filed by the claimants has to do with this aspect of the case, and rests upon the proposition that Captain Elliott, who had to act as pilot since his son did not hold a pilot's license for the Delaware River, must have been an overtired and fatigued man. From the nature of the case it will be seen that this is purely argumentative, not evidentiary. Captain Elliott had returned to the *Dodge* but four days before the voyage in question, having taken his ten days' time ashore under a custom prevailing on the ship, which was with the knowledge and acquiescence of the owner.

On May 25th he had been on watch from 6:00 a. m. until 12:00 o'clock noon, and probably during her docking at Eagle Point, which occurred at 2:10 p. m.; his watch began at 6:00 p. m.; and it is assumed that he was navigating his ship from that time until the collision, since he did not carry a license Delaware River pilot; nothing however can be assumed concerning his physical condition with respect to fatigue or otherwise.

The authorities relied upon by the claimants, namely, *The Denali*, 105 Fed. (2) 413; *N. Y. Marine #10*, 109 Fed. (2) 564; *Moran Towing etc.* v. *U. S.*, 90 Fed. Supp. 623; and *So. Carolina State etc.* v. *U. S.*, 78 Fed. Supp. 598, all involve fault and mishandling by the undermanned vessel, as the result of which limitation was denied upon the theory that there was a direct or causal relationship between that undermanning and the faulty navigation which caused the misadventure present in each cause.

There has been no such demonstration here.

These circumstances are even more favorable from the standpoint of the *Dodge* than those present in *U. S.* v. *Wessel, Duval, etc.*, 123 Fed. Supp. 318 at 337, a Southern District case in which Judge Ryan observed:

> "I find that the violation by Wessel Duval of the statutory requirement that there be three licensed mates aboard in no way contributed to the stranding of the *Edward Rutledge* on the morning of April 15. It is apparent that observance of the statute by the presence of a third mate aboard would not have averted the disaster; in such case 'the non-observance of such rule becomes immaterial.' *The Umbria*, 166 U. S. 404."

In this case, the undermanning was indeed fortuitous, for if the full complement had been carried on the *Dodge*, there would have been two watches below instead of one, with a probable increase in casualties by that margin.

> FINDING #11: There was no causal relation between undermanning which is assumed to have existed on the *Dodge*, and her navigation immediately prior to and at the collision.

PRIVITY

For the sake of completeness, it should be stated that the record presents no problem on this subject. The legal title to the *Dodge* was vested in the corporation first named as a petitioner and she was operated by Spentonbush, etc., also a petitioner; both of them were wholly owned subsidiaries of the parent Bushey Company, Ira S. Bushey & Sons, Inc., and the intercorporate relations, including for the most part identity of officers and directors, were such that knowledge of all operating, manning and other data affecting the navigation and conduct of the *Dodge* are to be attributed to the petitioners, and if need be, to their corporate owner.

The wreck in the Delaware & Chesapeake Canal to which reference has been made was that of a Bushey vessel; consequently the necessity on the part of the *Dodge* to use the route to Baltimore involving some miles at sea had been known to the petitioners for about ten days prior to this disaster. This means that the manning requirements which have been discussed, must be deemed to have been reckoned with by the petitioners.

The testimony of Captain Rossiter, the port captain employed by Diesel Vessel Operators, Inc., another Bushey subsidiary, and that of Mr. Francis B. Bushey, vice-president of the first named petitioner, leaves the court in no doubt on this general subject, so that if the last finding above made shall be held to be clearly erroneous, the way is open to correction without the necessity for a new trial.

> FINDING #12: The deficiency in the manning of the *Dodge* which has been assumed was with the privity of her owner.

CONCLUSIONS OF LAW

1. The court has jurisdiction of the parties to this proceeding and the subject-matter.

2. The striking of the tanker *Dodge* by the tanker *Michael* on June 25, 1952 at about 10:30 p. m. D. S. T. in that part of the Delaware River which includes Baker Range and Reedy Island Range was the result of faulty navigation on the part of the *Michael* in respect of the matters concerning which the foregoing findings of fact have been made.

3. The navigation of the *Dodge* from the time that she accepted the *Michael's* first one-blast signal has not been shown to have been at fault.

4. The *Dodge* was at fault for having failed to blow a danger signal and stop immediately upon the sounding of

the two-blast signal by the *Michael*, and that fault contributed to the disaster.

5. The undermanning of the *Dodge*, which has been assumed, had no causal relation to the striking of the *Dodge* by the *Michael*.

6. Both vessels were at fault, and this is therefore a both to blame case.

7. The petitioners are entitled to the benefit of limitation in this proceeding.

Settle decree in the usual form, providing for the appointment of a commissioner.

M. W. B.,
U. S. D. J.

Interlocutory Decree of District Court

(Also printed at R. 9)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Admiralty No. 19971

—o—

In the Matter

of

The Petition of DIESEL TANKER A. C. DODGE, INC., owner of the motor vessel *A. C. Dodge*, and SPENTONBUSH FUEL TRANSPORT SERVICE, INC., for exoneration from or limitation of liability.

—o—

A petition having been filed herein on the 24th day of November, 1952 by Diesel Tanker A. C. Dodge, Inc. and Spentonbush Fuel Transport Service, Inc. under the provisions of Sections 4283 to 4285 of the Revised Statutes of the United States and the several acts and statutes amendatory thereof and supplementary thereto, praying for limitation of its liability for loss, destruction, damage, and injury resulting from a collision of the *A. C. Dodge* with the SS. *Michael* in the Delaware River on the 25th day of May, 1952; and this Court having heretofore, to wit, on or about the 1st day of December, 1952 issued a monition against all persons claiming damages for any loss destruction, damage, or injury, occasioned by said collision, requiring such persons to appear before this Court and to file their claims and answers, and enjoining such persons from the beginning or further prosecution of any litigation in connection with their claims except in this proceeding; and

Public notice of said monition having been duly given as required by law and the practice of this Court, and the claim and answer of claimant J. M. Carras, Inc., and the claims of claimant Frances E. Elliott, as administratrix of the estate of John D. Elliott, claimant Joseph Kosinski, claimant Robert Palter, and other claimants who have since withdrawn from this proceeding, having been duly filed; and

The said Diesel Tanker A. C. Dodge, Inc. and Spentonbush Fuel Transport Service, Inc. having also contested any and all liability resulting from or in connection with said collision, independently of the limitation of liability so claimed as aforesaid; and having, pursuant to order of this Court filed herein an ad-interim stipulation in the sum of $500 with interest from May 25, 1952, executed on November 20, 1952 by United States Fidelity and Guarantee Company for the benefit of all persons awarded damages by reason of said collision; and

The matter having come on to be heard by the Court upon the petition and the answers thereto, and due deliberation having been had, and the Court having rendered its opinion holding both vessels at fault and granting limitation of liability, and having made findings of fact and conclusions of law;

Now, on motion of Haight, Gardner, Poor & Havens, proctaors for claimant, J. M. Carras, Inc., it is

ORDERED that the opinion filed herein on the 6th day of July, 1955, together with supplement to said opinion dated September 30, 1955, stand as the findings of fact and conclusions of law herein; and it is

ORDERED, ADJUDGED AND DECREED that the said petitioners, Diesel Tanker A. C. Dodge, Inc. and Spentonbush Fuel Transport Service, Inc., are not entitled to exemption from liability as claimed by them in their petition but that they are entitled to limitation of their liability as provided by an

act of Congress, approved March 3, 1851, and embodied in Sections 4283 and 4285 of the revised statutes of the United States and the various acts and statutes amendatory thereof and supplemental thereto; and it is further

ORDERED that this cause be, and it hereby is, referred to Frank C. Mason as a Commissioner of this Court, to take proofs and report to the Court his conclusions as to the amount or value of the petitioners' interest in the said vessel and her pending freight, if any, for the purpose of limitation of liability as of May 25, 1952, the date on which said disaster occurred and her voyage terminated, and as to the amount, validity, and priority of all claims filed herein, and to report thereon to this Court with the evidence taken before him, and his opinion both with respect to the amount or value of the petitioners' interest and with respect to the claims for death, personal injuries, loss of personal effects or other property, and the damages sustained by the owners of the SS. *Michael* (claimant, J. M. Carras, Inc.); and it is further

ORDERED that, before acting under this decree, said Commissioner shall take and file his oath of office with the clerk of this Court.

Dated: Brooklyn, N. Y., Dec. 7, 1955.

s/ MORTIMER W. BYERS,
United States District Judge.

Supplement to Opinion of District Court

(Also printed at R. 36)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

#A. 19971

—o—

In the Matter

of

The Petition of DIESEL TANKER A. C. DODGE, INC., owner of the Motor Vessel *A. C. Dodge* and SPENTONBUSH FUEL TRANSPORT SERVICE, INC., for exoneration from or limitation of liability.

—o—

Sept. 30, 1955.

BYERS, *D. J.*:

The petitioner has moved to resettle the Findings and Conclusions stated in the opinion heretofore filed, and in the following respects the motion is granted:

1. Finding No. 1 is corrected to change the word "June" to "May".

2. Conclusion of Law No. 2 is corrected to change the word "June" to "May".

3. In Conclusion of Law No. 4 the words in the second line "and stop" are deleted, for there is no evidence in the case concerning the engine movements of the *Dodge*.

The proposed findings are argumentative and therefore not proper in form.

To the extent indicated, the motion is granted; otherwise denied.

M. W. B.,
U. S. D. J.

Opinion of Court of Appeals

(Also printed at R. 84a)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 344—October Term, 1955

(Argued May 8, 1956 Decided July 7, 1956.)

Docket No. 23971

—o—

In the Matter

of

The Petition of DIESEL TANKER A. C. DODGE, INC., owner of the motor vessel A. C. DODGE, and SPENTONBUSH FUEL TRANSPORT SERVICE, INC., for exoneration from all limitation of liability,

Petitioners-Appellants and Cross-Appellees.

J. M. CARRAS, INC.,

Claimant-Appellee and Cross-Appellant.

FRANCES E. ELLIOTT, Administratrix of the Estate of John D. Elliott, Deceased,

Claimant-Appellee.

—o—

Before:

CLARK, FRANK and HINCKS,

Circuit Judges.

Appeal and cross-appeal from a decree of the United States District Court for the Eastern District of New York, entered by Judge Byers. Affirmed.

FOLEY & MARTIN, Proctors for Petitioners, CHRISTOPHER E. HECKMAN, and JOHN H. HANRAHAN, JR., of Counsel.

HAIGHT, GARDNER, POOR & HAVENS, Proctors for Claimant-Appellee and Cross-Appellant J. M. Carras, Inc.

ABRAHAM E. FREEDMAN, FREEDMAN, LANDY & LORRY, GREENHILL AND GREENHILL, Proctors for Claimant-Appellee, Frances E. Elliott as Administratrix of the Estate of John D. Elliott.

FRANK, *Circuit Judge*:

The Dodge, as a result of a collision with the Michael, exploded, burned and sank. The owner of the Dodge instituted a limitation proceeding. Among the claimants were the owner of the Michael and the administratrix of the Master of the Dodge who lost his life in the disaster. The facts are fully stated in the opinion of the trial judge, reported in 133 F. Supp. 510. We think his findings were not "clearly erroneous."[1]

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[1] Among the findings are these:

The Michael blew a one-whistle signal to the Dodge for a port passing. The Dodge answered with a one-blast acceptance "while the vessels were yet far enough apart to safely affect such a passing. After an interval of about one and one-half minutes, the Michael blew a two-blast signal (without reducing her speed) for a starboard passing. The Dodge did not answer that signal, nor did she blow a danger signal. Within about one minute or slightly less, the Michael blew a one-blast signal for a port passing, and in less than a minute the Michael ran down the Dodge and sank her. The Michael did not blow a danger signal at any time."

Originally the judge concluded: "The Dodge was found at fault for having failed to blow a danger signal *and stop* immediately upon the sounding of the two-blast signal by the Michael, and that fault contributed to the disaster." [Emphasis added.] On motion of the Dodge, the judge deleted the words "and stop." He explained that "there is no evidence in the case concerning the engine movements of the Dodge." Thus we have no finding that the Dodge either did or did not stop.

The owner of the Dodge appeals, asserting that the judge erred in holding the Dodge to blame, and in allowing recovery to the administratrix of the Dodge's Master.[2] The owner of the Michael concedes that the judge correctly held her to blame, but cross-appeals, arguing that the owner of the Dodge was not entitled to limitation of liability because the Dodge, to the knowledge of her owner, violated the manning statutes,[3] and that this violation contributed to the collision.

1. The Dodge argues that the judge erroneously held the Dodge at fault for not sounding a danger signal in violation of Article 18, III of the Inland Rules (33 U. S. C. Section 203) which reads: "If, when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam whistle." The Dodge contends that Rule III is inapplicable here because the evidence does not show, and the judge did not find, that the Dodge failed to understand the Michael's course when the latter sounded her two whistle signal. We rejected such an interpretation of the Rule in *The San Simeon*, 63 F. 2d 798, 800, 801 (C. A. 2),

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[2] Although the Dodge was a total loss, its owner has a substantial financial interest. The owner, in its brief, states the following: "Its claim against the Michael for the total loss of the Dodge is pending in the District Court of Maryland, where *in rem* jurisdiction was obtained (*cf.* related decision 218 F. (2d) 911). As under the trial judge's decision, which holds the Dodge and the Michael both to blame, there will be an equal division of all damages, both the Michael's and the Dodge's. Therefore the effect of his decision is to permit the Michael in the Maryland action, where she is a defendant, to offset one-half of her damages against one-half the Dodge's. Any balance in her favor collected by the Dodge in that suit against the Michael will be surrendered in the instant proceeding and will become the Dodge's limitation of liability fund for the benefit of other claimants. The Dodge's value was in the million dollar range."

[3] 46 U. S. C. Sections 222, 223, 235, 673.

where we said, per Judge Learned Hand: "It seems to us that with every allowance the navigation of the Commercial Mariner will not pass muster. She ought to have blown an alarm as soon as she got the San Simeon's signal (article 18, Rule III, Inspector's Rule 1); we are also disposed to think that she ought to have stopped and backed. * * * We hold the Commercial Mariner for failing to answer the double blast with an alarm. As to this fault, it is indeed true that the Commercial Mariner was not in doubt as to the San Simeon's intention, and, reading the rule literally, that is the only occasion for the danger signal. But a fortiori when the proposed navigation is plainly impracticable, the ship should blow. The Bergen (D. C.), 108 F. 555, affirmed 128 F. 920 (C. A. 2). It is indeed impossible to say that this would have changed the result, but the fault being the breach of a rule, the Commercial Mariner must satisfy any doubts. Such a signal would have told the San Simeon that the Commercial Mariner thought her navigation dangerous; not being followed by a backing signal it ought to have told her that she was coming on. It is impossible to say what she would have done in this predicament, but it must have appeared to her that the Commercial Mariner did not mean to pass under her stern. It is quite possible that she would have slackened speed, as she did when the situation developed more completely. A very little change would have sufficed; the Commercial Mariner needed only several seconds to escape. Such speculations the law throws upon the vessel which fails in her duty. It seems to us enough to charge her." After indicating that the Commercial Mariner was also at fault because she did not stop and back, Judge Hand added: "We do not however find it necessary to put the result upon a failure to stop and back, because the delay in sounding the alarm is enough."[4] See also *Merritt, Chapman & Scott Corporation* v. *Texas Co.*, 98 F. 2d 719, 721 (C. A. 2).

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[4] Accordingly, the decision did not turn on the ground of the Commercial Mariner's failure to stop and back.

2. The Dodge further contends as follows: "A danger signal by the Dodge at the time of the Michael's two whistle signal would have been inappropriate if in fact there was no danger; on the other hand, a two whistle signal by the Dodge at a time when the Michael was preparing to pass the Dodge port to port might have created serious consequences on the Michael, if the Michael's two blasts were intended for someone else, as the Dodge captain might well have thought, at least until investigation proved otherwise. Consequently if the Dodge did not blow any whistle signals after the Michael's two, it may be that the decision not to do so was the deliberate exercise of the Dodge's navigator's best judgment in the existing circumstances."

But even assuming that the evidence sufficiently disclosed the presence of other vessels or a basis for a reasonable belief by the Dodge that they might have been present, we think the contention untenable. In *National Bulk Carriers* v. *United States*, 183 F. 2d 405, 408 (C. A. 2), we said: "Appellee does not now seriously, nor can it plausibly, press upon us, as justification for the master's failure to sound a one-blast signal, his explanation made at the trial that he did not do so for fear of giving rise to confusion and starting the Rutgers Victory on some unprudent course which would make the situation more serious. The Rules do not admit of violation for fear of causing confusion. Cf. A. H. Bull Steamship Co. v. United States, 2 Cir., 34 F. 2d 614." See also *Merritt, Chapman & Scott Corp.* v. *Texas Co.*, 98 F. 2d 719, 721 (C. A. 2): "While we should not care to commit ourselves to the doctrine that it can never be a fault to blow a danger signal, we are at a loss to think of an occasion when it would be, the books do not contain a whisper that it ever is.* * * "

3. Since the Dodge violated the statute, there is no merit in the suggestion that it is not certain that a danger signal would have enabled the Michael to avoid the collision. For the Dodge had the burden of proving that by no possibility

did the violation contribute to the collision. See *The Pennsylvania*, 19 Wall. 125; *The San Simeon, supra.* The Dodge did not bear this burden: On the basis of the finding as to the time which elapsed after the Michael's two-blast signal, we cannot say that the collision would not have been averted if the Dodge had complied with the Rule. The judge therefore correctly concluded, "The Dodge was at fault for having failed to blow a danger signal immediately upon the sounding of the two-blast signal by the Michael, and that fault contributed to the disaster."

We think the Dodge's fault was not so minor in character as to justify the application of the minor-fault doctrine. The resultant division of damages, half-and-half, is irrational and unjust. Guided by the *Max Morris*, 137 U. S. 1, we have held that the more rational doctrine of comparative negligence applies in the case of personal injuries.[5] We cannot do likewise in a case like this.

4. We see no reason to reject the judge's finding that, even assuming the Dodge was undermanned, there was "no causal relation between" the "undermanning and her navigation immediately prior to and at the collision." This disposes of the cross-appeal.

5. The judge said that "nothing can be assumed concerning the physical condition" of the Dodge's master "with respect to fatigue or otherwise." On that basis, the Dodge contends that, if she was at fault, that fault was necessarily ascribable to her Master's negligence, so that his administratrix cannot recover from the Dodge. To make out this defense, the Dodge had the burden of proving the Master's negligence. The record, however, contains no affirmative evidence that the Master was responsible for the fault. For all that appears, quite legitimately, for any one of several reasons not too difficult to surmise he may not have been on the bridge at the time. Consequently, the

[5] *Ahlgren* v. *Star Towing & Transport Co. Inc.*, 214 F. 2d 618, 620-621 (C. A. 2) and cases there cited.

judge committed no error in not finding the Master negligent.

Affirmed.

HINCKS, *Circuit Judge* (dissenting in part):

I dissent but only as to the implications in Point 5 of the majority opinion as to the claim against Dodge for the death of its Master made by his administratrix. We have sustained findings that the only fault of the Dodge was failure to sound a danger signal and that this failure was not caused by undermanning. Further, as counsel for the administratrix say in their brief, the collision occurred during the Master's watch and he was the only pilot on board as the Dodge, in a narrow channel, was confronted by vessels approaching from an opposing direction. From these facts, I think a conclusion was imperatively required that the Master, who was either on the bridge or should have been there, was responsible for the only fault on the part of the Dodge which was proved. On such a conclusion, the claim made by the administratrix should have been dismissed. Instead, without express holding that the Dodge was liable to the administratrix, by its decree the court referred the claim (with others) to a Commissioner for a report as to its "amount, validity, and priority." In so doing, I think the court unnecessarily deferred to a later stage a final ruling which should have been incorporated into its interlocutory decree.

Judgment of Court of Appeals

(Also found at R. 92a)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 7th day of June, one thousand nine hundred and fifty-six.

Present:

HON. CHARLES E. CLARK,
Chief Judge.
HON. JEROME N. FRANK,
HON. CARROLL C. HINCKS,
Circuit Judges.

In the Matter
of
Petition of DIESEL TANKER A. C. DODGE, INC., owner of the Motor Vessel A. C. DODGE and SPENTONBUSH FUEL TRANSPORT SERVICE,

Petitioner-Appellant.

SJUR B. TELLEFSEN,
Claimant-Appellant.

J. M. CARRAS, INC.,
Claimant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed; with costs taxed in favor of appellee, Frances E. Elliott, Administratrix, etc.

A. DANIEL FUSARO,
Clerk.

Opinion of Court of Appeals Denying Petitions for Reargument

(Also found at R. 107a)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

—o—

In the Matter

of

The Petition of DIESEL TANKER A. C. DODGE, INC., owner of the motor vessel A. C. DODGE, and SPENTONBUSH FUEL TRANSPORT SERVICE, INC., for exoneration from or limitation of liability,

Petitioners-Appellants and Cross-Appellees,

J. M. CARRAS, INC.,

Claimant-Appellee and Cross-Appellant,

FRANCES E. ELLIOTT, Administratrix of the Estate of John D. Elliott, Deceased,

Claimant-Appellee.

—o—

Before CLARK, Chief Judge, and FRANK and HINCKS, Circuit Judges.

On Petitions for Rehearing, Reargument, or Reconsideration filed by both petitioners and claimant.

FOLEY & MARTIN, New York City (CHRISTOPHER E. HECKMAN and JOHN H. HANRAHAN, JR., New York City, of counsel), for petitioners-appellants.

HAIGHT, GARDNER, POOR & HAVENS, New York City (MACDONALD DEMING, JAMES M. ESTABROOK, GORDON W. PAULSEN, and RICHARD G. ASHWORTH, New York City, of counsel), for J. M. Carras, Inc., claimant-appellee and cross-appellant.

PER CURIAM.

The respective petitions of petitioners and claimant are denied.

C. E. C.,
J. N. F.,
C. C. H.,
C. JJ.

Filed: July 13, 1956.

Order of Court of Appeals Denying Petitions for Reargument

(Also found at R. 109a)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirteenth day of July, one thousand nine hundred and fifty-six.

Present:

HON. CHARLES E. CLARK,
Chief Judge.
HON. JEROME N. FRANK,
HON. CARROLL C. HINCKS,
Circuit Judges.

—o—

In the Matter
of
The Petition of DIESEL TANKER A. C. DODGE, INC., owner of M/V A. C. DODGE, and SPENTONBUSH FUEL TRANSPORT SERVICE INC., etc.,

Petitioners-Appellants and Cross-Appellees.

J. M. CARRAS, INC.,
Claimant-Appellee and Cross-Appellant.

FRANCES E. ELLIOTT, etc.,
Claimant-Appellee.

—o—

Petitions for a rehearing having been filed herein by counsel for the appellants and by counsel for J. M. Carras, Inc.,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk.
by RALPH C. CURCIO,
Deputy Clerk.

APPENDIX B

Petition of J. M. Carras, Inc. for rehearing by Court of Appeals on question of limitation of liability.

(Also found at R. 100a)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 23971

—o—

In the Matter of

The Petition of DIESEL TANKER A.C. DODGE, INC., owner of the Motor Vessel A.C. DODGE, and SPENTONBUSH FUEL TRANSPORT SERVICE, INC., for exoneration from or limitation of liability,

Petitioners-Appellants and Cross-Appellees,

J. M. CARRAS, INC.,

Claimant-Appellee and Cross-Appellant.

—o—

PETITION FOR REHEARING

Cross-appellant J. M. Carras, Inc., petitions for a rehearing of the cross appeal herein taken by said J. M. Carras, Inc., which was decided on June 7, 1956 in an opinion rendered for this Court by Circuit Judge Jerome N. Frank.

The ground upon which such rehearing is asked is that this Court erroneously interpreted the District Judge's statement that there was "no causal relation between" the Dodge's assumed undermanning and the collision.

Rehearing is asked so that so much of the Interlocutory Decree of the United States District Court for the Eastern District of New York as provides that petitioners herein are entitled to limit their liability may be reversed.

Argument

The Court erroneously placed upon the claimant the burden of proving a causal relationship between the undermanning of the Dodge and her negligent navigation. The District Court's finding that there was no causal relationship was based not upon *proof of the absence* of such relationship, but upon the *absence of proof* of any causal relationship between the undermanning and the negligence.

In accepting the statement of the District Court that there was no evidence as to causal relation, this court has evidently misunderstood the basis for such finding and has erroneously assumed that there was evidence before the District Court that there was no causal relation.

In its opinion the District Court observed (Opinion A. 33) that the proposition that the master of the Dodge "must have been an overtired and fatigued man" was "purely argumentative, not evidentiary" and that "nothing however can be assumed concerning his physical condition with respect to fatigue or otherwise". The District Court stated that there was no "demonstration" of a causal relationship between the undermanning and the faulty navigation of the Dodge. The Court did *not* state that there was proof that no such causal relationship existed.

It is clear from the foregoing that the District Court placed upon the claimants the burden of "demonstrating" a causal relationship between violation of the undermanning statutes and the negligence which caused the collision.

As shown in our main brief on appeal, pages 24 to 27, where violation of the statutory manning requirements designed to promote the safety of life at sea has been shown, the burden is upon the party violating the statute (in this case the petitioners) to meet the test of the *Pennsylvania*

rule and prove that such statutory violation could not have contributed to the collision.

Where, as in the present case, there is no proof that there was *no* causal relationship between the statutory violation and the negligence, the petitioners have failed to establish the lack of causal relationship. It follows that the finding of the District Judge relied on by this Court on this cross appeal is in fact a finding favorable to cross-appellant J. M. Carras, Inc., and should lead to a granting of the cross appeal and consequent denial of limitation of liability to petitioners.

The failure of petitioners to meet their burden of proving that the undermanning could not have contributed to the collision is not avoided by the observation of this Court that the record contains no affirmative evidence that the master of the Dodge himself was responsible for the Dodge's fault in failing to sound a danger signal, because "he may not have been on the bridge at the time." If Captain Elliott was not on the bridge at the crucial time, when his vessel was meeting another vessel at a bend in a narrow channel on the Delaware River, then in addition to violations of the undermanning statutes, 46 U. S. C. §§ 222, 223, 235, and 673, the Dodge was also in violation of 46 U. S. C. § 364, which requires that navigation in these waters shall be "under the control and direction of pilots licensed under the inspectors of steamboats," since the District Court found that Captain Elliott was the only licensed pilot aboard the Dodge. It follows that a possibility that Captain Elliott was not on the bridge of the Dodge does not relieve the petitioners of the *Pennsylvania* burden arising from their violations of statute.

Since the District Court found that there was no evidence on this subject, the Court has found that the petitioners failed to meet their burden. Accordingly, the petitioners were not entitled to limit their liability.

Conclusion

It is respectfully requested that a rehearing be granted of the cross appeal and that, upon such rehearing, so much of the decree under review as provides that petitioners herein are entitled to limit their liability may be reversed.

Respectfully submitted,

Haight, Gardner, Poor & Havens,
Proctors for Cross-Appellant,
J. M. Carras, Inc.

MacDonald Deming,
James M. Estabrook,
Gordon W. Paulsen,
Richard G. Ashworth,
of Counsel.

Certificate

I hereby certify that the foregoing petition for rehearing is submitted in good faith, not for any purpose of delay, and in my judgment, upon sufficient grounds.

Dated: New York, N. Y., June 22, 1956.

MacDonald Deming.

APPENDIX C

Statutes Involved

46 U. S. C. § 183. *Amount of liability; loss of life or bodily injury; privity imputed to owner; "seagoing vessel".*

(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

(b) In the case of any seagoing vessel, if the amount of the owner's liability as limited under subsection (a) is insufficient to pay all losses in full, and the portion of such amount applicable to the payment of losses in respect of loss of life or bodily injury is less than $60 per ton of such vessel's tonnage, such portion shall be increased to an amount equal to $60 per ton, to be available only for the payment of losses in respect of loss of life or bodily injury. If such portion so increased is insufficient to pay such losses in full, they shall be paid therefrom in proportion to their respective amounts.

(c) For the purposes of this section the tonnage of a seagoing steam or motor vessel shall be her gross tonnage without deduction on account of engine room, and the tonnage of a seagoing sailing vessel shall be her registered tonnage: Provided, That there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use.

(d) The owner of any such seagoing vessel shall be liable in respect of loss of life or bodily injury arising on distinct occasions to the same extent as if no other loss of life or bodily injury had arisen.

(e) In respect of loss of life or bodily injury the privity or knowledge of the master of a seagoing vessel or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel.

(f) As used in subsections (b), (c), (d), and (e) of this section and in section 183b of this title, the term "seagoing vessel" shall not include pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels or their tenders, self-propelled lighters, nondescript self-propelled vessels, canal boats, scows, car floats, barges, lighters, or nondescript non-self-propelled vessels, even though the same may be seagoing vessels within the meaning of such term as used in section 188 of this title. (Rev. Stat. Sec. 4283, as amended.)

46 U. S. C. § 222. *Complement of officers and crew of vessels; penalties.*

No vessel of the United States subject to the provisions of title 52 of the Revised Statutes or to the inspection laws of the United States shall be navigated unless she shall have in her service and on board such complement of licensed officers and crew including certificated lifeboat men, separately stated, as may in the judgment of the Coast Guard be necessary for her safe navigation. The Coast Guard shall make in the certificate of inspection of the vessel an entry of such complement of officers and crew including certificated lifeboat men, separately stated, which may be changed from time to time by indorsement on such certificate by the Coast Guard by reason of change of conditions or employment. Such entry or indorsement shall be

subject to a right of appeal, under regulations to be made by the Commandant of the Coast Guard, to the Commandant of the Coast Guard, who shall have the power to revise, set aside, or affirm the said determination.

If any such vessel is deprived of the services of any number of the crew including certificated lifeboat men, separately stated, without the consent, fault, or collusion of the master, owner, or any person interested in the vessel, the vessel may proceed on her voyage if, in the judgment of the master, she is sufficiently manned for such voyage: *Provided*, That the master shall ship, if obtainable, a number equal to the number of those whose services he has been deprived of by desertion or casualty, who must be of the same grade or of a higher rating with those whose places they fill. If the master shall fail to explain in writing the cause of such deficiency in the crew including certificated lifeboat men, separately stated, to the Coast Guard within twelve hours of the time of the arrival of the vessel at her destination, he shall be liable to a penalty of $50. If the vessel shall not be manned as provided in this section, the owner shall be liable to a penalty of $100, or in case of an insufficient number of licensed officers to a penalty of $500. (Rev. Stat. Sec. 4463, as amended.)

46 U. S. C. § 223. *Minimum number of officers.* The board of local inspectors shall make an entry in the certificate of inspection of every ocean and coastwise seagoing merchant vessel of the United States propelled by machinery, and every ocean-going vessel carrying passengers, the minimum number of licensed deck officers required for her safe navigation according to the following scale:

No such vessel shall be navigated unless she shall have on board and in her service one duly licensed master.

Every such vessel of one thousand gross tons and over, propelled by machinery, shall have in her service and on board three licensed mates, who shall stand in three watches while such vessel is being navigated, unless such vessel is engaged in a run of less than four hundred miles

from the port of departure to the port of final destination, then such vessel shall have two licensed mates; and every vessel of two hundred gross tons and less than one thousand gross tons, propelled by machinery, shall have two licensed mates.

Every such vessel of one hundred gross tons and under two hundred gross tons, propelled by machinery, shall have on board and in her service one licensed mate, but if such vessel is engaged in a trade in which the time required to make the passage from the port of departure to the port of destination exceeds twenty-four hours, then such vessel shall have two licensed mates.

Nothing in this section shall be so construed as to prevent local inspectors from increasing the number of licensed officers on any vessel subject to the inspection laws of the United States, if, in their judgment, such vessel is not sufficiently manned for her safe navigation: *Provided*, That this section shall not apply to fishing or whaling vessels, yachts, or motor boats as defined in chapter 16, or to wrecking vessels. (40 Stat. 549, as amended.)

46 U. S. C. § 235. *Watch duty of deck officers.* It shall be unlawful for the master, owner, agent, or other person having authority to permit an officer of any vessel to take charge of the deck watch of the vessel upon leaving or immediately after leaving port, unless such officer shall have had at least six hours off duty within the twelve hours immediately preceding the time of sailing, and no licensed officer on any ocean or coastwise vessel shall be required to do duty to exceed nine hours of any twenty-four while in port, including the date of arrival, or more than twelve hours of any twenty-four at sea, except in a case of emergency when life or property is endangered. Any violation of this section shall subject the person or persons guilty thereof to a penalty of $100. (40 Stat. 549, as amended.)

46 U. S. C. § 364. *Vessels navigating coastwise and on Great Lakes.*

All coastwise seagoing vessels, and vessels navigating the Great Lakes, shall be subject to the navigation laws of the United States, when navigating within the jurisdiction thereof; and all vessels, propelled in whole or in part by steam, and navigating as aforesaid, shall be subject to all the rules and regulations established in pursuance of law for the government of steam vessels in passing, as provided by this and the following chapter; and every coastwise seagoing steam vessel subject to the navigation laws of the United States, and to the rules and regulations aforesaid, not sailing under register, shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats. (Rev. Stat. Sec. 4401, as amended.)

46 U. S. C. § 673. *Requirements as to watches; duties of seamen; hours of work; penalty; right of seaman to discharge; effective date.*

In all merchant vessels of the United States of more than one hundred tons gross, excepting those navigating rivers, harbors, lakes (other than Great Lakes), bays, sounds, bayous, and canals, exclusively, the licensed officers and sailors, coal passers, firemen, oilers, and water tenders shall, while at sea, be divided into at least three watches, which shall be kept on duty successively for the performance of ordinary work incident to the sailing and management of the vessel: *Provided*, That in the case of radio-telegraph operators this requirement shall be applicable only when three or more radio officers are employed. No licensed officer or seaman in the deck or engine department of any tug documented under the laws of the United States (except boats or vessels used exclusively for fishing purposes) navigating the Great Lakes, harbors of the Great Lakes, and connecting and tributary waters between Gary, Indiana; Duluth, Minnesota; Niagara Falls, New York; and Ogdensburg, New York, shall be required or permitted to work more than eight hours in one day except in case of extraordinary emergency affecting the safety of the vessel and/or

life or property. The seamen shall not be shipped to work alternately in the fireroom and on deck, nor shall those shipped for deck duty be required to work in the fireroom, or vice versa; nor shall any licensed officer or seaman in the deck or engine department be required to work more than eight hours in one day; but these provisions shall not limit either the authority of the master or other officer or the obedience of the seamen when in the judgment of the master or other officer the whole or any part of the crew are needed for maneuvering, shifting berth, mooring, or unmooring the vessel or the performance of work necessary for the safety of the vessel, her passengers, crew, and cargo, or for the saving of life aboard other vessels in jeopardy, or when in port or at sea, from requiring the whole or any part of the crew to participate in the performance of fire, lifeboat, or other drills. While such vessel is in a safe harbor no seaman shall be required to do any unnecessary work on Sundays or the following-named days: New Year's Day, the Fourth of July, Labor Day, Thanksgiving Day, and Christmas Day, but this shall not prevent the dispatch of a vessel on regular schedule or when ready to proceed on her voyage. And at all times while such vessel is in a safe harbor, eight hours, inclusive of the anchor watch, shall constitute a day's work. Whenever the master of any vessel shall fail to comply with this section and the regulation issued thereunder, the owner shall be liable to a penalty not to exceed $500, and the seamen shall be entitled to discharge from such vessel and to receive the wages earned. But this section shall not apply to vessels engaged in salvage operations: *Provided*, That in all tugs and barges subject to this section when engaged on a voyage of less than six hundred miles, the licensed officers and members of crews other than coal passers, firemen, oilers, and water tenders may, while at sea, be divided into not less than two watches, but nothing in this proviso shall be construed as repealing any part of section 222 of this title. This section shall take effect six months after June 25, 1936. **(38 Stat. 1164, as amended.)**

NOV 9 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 500.

IN THE MATTER

of

The Petition of DIESEL TANKER A. C. DODGE, INC., owner of the Motor Vessel A. C. DODGE and SPENTONBUSH FUEL TRANSPORT SERVICE, INC., for exoneration from or limitation of liability,

J. M. CARRAS, INC.,

Petitioner.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

CHRISTOPHER E. HECKMAN,
Counsel for Respondents Diesel Tanker A. C. Dodge, Inc., and Spentonbush Fuel Transport Service, Inc.,
64 Wall Street,
New York 5, N. Y.

FOLEY & MARTIN,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM 1956.

No. 500.

IN THE MATTER

of

The Petition of DIESEL TANKER A. C. DODGE, INC., owner of the Motor Vessel A. C. DODGE and SPENTONBUSH FUEL TRANSPORT SERVICE, INC., for exoneration from or limitation of liability,

J. M. CARRAS, INC.,

Petitioner.

THE ANSWER OF DIESEL TANKER *A. C. DODGE, INC.*, AND SPENTONBUSH FUEL TRANSPORT SERVICE, INC., TO THE PETITION OF J. M. CARRAS, INC., FOR A WRIT OF CERTIORARI.

By petition filed in this Court of October 10th, 1956, and assigned Docket Number 497, these answering respondents prayed this Court to review this case and correct errors assigned to so much of the decisions as relate to responsibility between the two vessels for the collision in which they were involved. While these respondents seek this Court's review of the questions presented in their petition, they oppose this application of J. M. Carras, Inc. for the limited review sought by that party's petition.

Clarification of certain of the statements in the petition demonstrates that the question stated therein is not involved in the case.

Neither the District Court nor the Court of Appeals held that the *Dodge* was undermanned at the time of the collision. Therefore, violation of a manning statute is not before this Court.

The certificate issued by the Coast Guard to indicate the number of crew which in its judgment was required aboard the *Dodge,* enumerated crew requirements in numbers which varied with the different bodies of water in which the *Dodge* might be navigated during the year for which the certificate was to be in force. For example, long coastwise voyages required four deck officers, short coastwise voyages required three, trips on Bays, Sounds or Rivers (Inland Waters) two—less when the *Dodge* operated only twelve hours per day—and for navigation on the Great Lakes an entirely different number was stated.*

The owner hired and paid the number of crew required for coastwise trips, but when the *Dodge* was navigating inland waters where a lesser crew was ample, unnecessary personnel frequently absented themselves from the vessel.

As the District Court stated the collision occurred in the Delaware River.[1] Normally this voyage from Eagle Point, N. J. to Baltimore, Md., would not have required the *Dodge* to leave inland waters,[2] but because of a wreck in the Chesapeake & Delaware Canal,[3] the *Dodge* would have had to pass into coastwise waters if the collision had not occurred and if she had completed the trip. If she had done so without taking aboard the absent crew members, she would *at a time subsequent to the collision* have been navigating with less than the number of crew indicated by the certificate for operation in such waters. That

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* Cf. Petitioner's Ex. 6, in Record filed in Docket No. 497.

[1] Page 13 Appendix to petition.

[2 and 3] Page 29 of Appendix to this petition.

situation never arose. The *Dodge* was still in inland waters and had not gone outside inland waters between the time the voyage began and the time the collision occurred.

The District Court specifically declined to decide that the *Dodge* was undermanned and quoted that portion of the Coast Guard certificate which stated the number of crew to be aboard when navigating on "Bays, Sounds and Rivers" (Inland Waters).[1] The District Court at one point referred to the quoted portion of the certificate as a "modification"[2] and later as a "restriction" saying:[3]

> "* * * Therefore it is argued that the quoted restriction from the certificate should not be held to apply to this voyage (although the collision occurred in the river before the voyage was completed), and the *Dodge* must be deemed to have been undermanned because part of the voyage would be coastwise."

For the purpose of discussing petitioner's argument, the District Court stated:[4]

> "It is assumed *but not decided,* that the *Dodge* was undermanned for the purpose of a coastwise voyage which had been begun when she left Eagle Point to the knowledge of her owner and operator (Spentonbush)." (Italics supplied.)

Completely disposing of petitioner's argument and the assumption adopted for its purposes, the Court stated as fact finding numbered 11:[5]

> "There was no causal relation between undermanning *which is assumed to have existed on the*

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[1] Page 28 of Appendix to this petition.
[2] Page 28 of Appendix to this petition.
[3] Page 29 of Appendix to this petition.
[4] Page 30 of Appendix to petition.
[5] Page 31 of Appendix to petition.

> *Dodge,* and her navigation immediately prior to and at the collision." (Italics supplied.)

The Court of Appeals treated petitioner's argument in the same manner, saying:[1]

> "We see no reason to reject the judge's finding that, even assuming the *Dodge* was undermanned, there was 'no causal relation between' the 'undermanning and her navigation immediately prior to and at the collision.' This disposes of the cross appeal."

Thus petitioner's necessary premise, viz: a finding that the *Dodge* was undermanned at the time of collision, falls. Citation of cases involving violations of a manning statute are inappropriate to a case wherein the Court did not find that the vessel was in violation of the statute at the time of the collision.

The petition should be denied.

Respectfully submitted,

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[1] Page 43 of Appendix to petition.

NOV 9 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term—1956

No. 500

In the Matter of

The Petition of DIESEL TANKER A. C. DODGE, INC., owner of the Motor Vessel A. C. DODGE, and SPENTONBUSH FUEL TRANSPORT SERVICE, INC., for exoneration from or limitation of liability,

J. M. CARRAS, INC.,

Petitioner.

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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of Counsel.

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The issue presented by this petition is whether, assuming violation by the DODGE of the manning statutes, the Courts below erred in placing on the MICHAEL the burden of "demonstration" (Opinion of Trial Court, Petition, Appendix A, p. 30) that such violation contributed to the collision. It is the rule of this Court and of other Circuits that the burden is on the DODGE to show absence of causal relation between her shortage of qualified navigating officers and her contributory fault in failing to sound a danger signal.

Respondents' brief in opposition *does not even mention this issue.* Respondents' brief merely urges that on the facts there was no violation and that the Courts below did not specifically hold that the DODGE was in violation of the manning statutes.

The Trial Court, as petitioner is prepared to demonstrate in its brief on the merits, determined facts which establish undermanning as a matter of law. The Trial

Court also made a specific finding that "the deficiency of the manning of the *Dodge* which has been assumed was with the privity of her owner" (Finding #12, Petition, Appendix A, p. 32), so that if the finding of no causal relation between the undermanning and the collision were found clearly erroneous, "the way is open to correction without the necessity for a new trial" (Opinion of the Trial Court, Petition, Appendix A, p. 32).

The Courts below made no conclusion of law of undermanning because their error as to the burden of proof of causal relation (as to which this Court's review is asked in the petition) made such a conclusion unnecessary. There is thus no ground for requesting the Courts below to make a conclusion of law of undermanning until correction by this Court of their error of law as to burden of proof of causal relation. After such correction "the way is open" for a conclusion of law of undermanning on the basis of the facts already found.

CONCLUSION

It is respectfully submitted that the foregoing considerations warrant allowance of the writ sought by petitioner.

Dated: New York, N. Y.,
November 8, 1956.

Respectfully submitted,

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